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No. 92-1817

In The

Supreme Court of the United States

October Term, 1992

MILES INC.,

Petitioner,

v.

DONALD BRUCE SONDERGARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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I. RESPONDENT HAS NOT RECONCILED THE EIGHTH CIRCUIT'S OPINION BELOW WITH THE DECISIONS OF OTHER CIRCUITS AND THIS COURT WITH RESPECT TO WHETHER A CORPORATION'S APPOINTMENT OF A REGISTERED AGENT CONSTITUTES A WAIVER OF THE RIGHT TO BE SUED ONLY IN JURISDICTIONS WHERE IT HAS HAD MINIMUM CONTACTS.

A. There Is A Conflict Among The Lower Courts.

In its Petition For Certiorari, Miles Inc. ("Miles") showed that the Eighth Circuit's decision below is directly in conflict with the decisions of the Fifth, First and Fourth Circuits in *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1047 (1993); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 89 (1st Cir. 1990); and *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971). In those cases, and in several district court decisions, the courts held that the appointment of a registered agent was not sufficient to establish jurisdiction under the Due Process Clause. Respondent Sondergard attempts to distinguish these cases, but to no avail.

Sondergard first argues that none of these cases "specifically address the issue of express consent" (Brief In Opposition at 6), then he concedes that *Siemer* did address the consent issue (*Id.*). Indeed, *Siemer* held that the appointment of a registered agent does *not* constitute a consent to jurisdiction or a waiver of constitutional rights. 966 F.2d at 183. Sondergard next attempts to distinguish *Siemer* on the basis that Donald Sondergard was a resident of the forum state at the time the suit was filed

(having moved there after the cause of action arose elsewhere). However, the plaintiff's domicile is completely irrelevant to a "consent" or "waiver" analysis.[1] Finally, Sondergard tries to distinguish this case from *Siemer* on the ground that "Miles did and continues to do substantial business in the state." (Brief In Opposition at 7.) However, this is an unwarranted assertion based on no evidence in the record. There is certainly no evidence that Miles' activity was more substantial than the forum state activities of the *Siemer* defendant, Learjet, which sold over one percent of its products in the forum state,[2] had a subsidiary in the forum state, advertised in the forum state and mailed information to prospective customers in the forum state. 966 F.2d at 181. The record here only shows that Miles products appeared on store shelves in

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[1] Even under a "minimum contacts" analysis, which Sondergard is trying to avoid here, the plaintiff's domicile is irrelevant unless there is some relationship between the plaintiff and defendant and the plaintiff's residence is the focus of the defendant's activities out of which the suit arises. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984). *See Rush v. Savchuk*, 444 U.S. 320, 327 (1980) (no jurisdiction though plaintiff moved to forum state after cause of action arose; due process focuses on "the relationship among the *defendant*, the forum, and the litigation" (emphasis added)). Here, it is undisputed that the cause of action did *not* arise from Miles' South Dakota activities, and Miles had no relationship with Sondergard that would point to the existence of any other contacts between Miles and South Dakota. Sondergard's residence is not relevant to the minimum contacts analysis, and is certainly not determinative as suggested by Sondergard.

[2] There is no corresponding evidence as to what percentage of Miles' sales are to residents of South Dakota, which contains 0.28% of the nation's population. World Almanac at 385, 642 (1993).

the forum state. The same was true in *Siemer*. *Siemer* is constitutionally indistinguishable from the present case.

Sondergard's attempt to distinguish *Ratliff* and *Sandstrom* is equally unavailing. He argues that those cases were decided under the principal of "implied consent" (which Sondergard equates with "minimum contacts") instead of the principal of "express consent" (which he equates with waiver),[3] under which he contends the present case was decided. (Brief In Opposition at 4, 7.) In other words, although the facts of *Ratliff* and *Sandstrom* are the same as those of the present case (registered agent in forum, cause of action arising outside forum), and the *holdings* are in conflict (exercise of jurisdiction held unconstitutional in those cases, constitutional by Eighth Circuit below), Sondergard is apparently arguing that the *rationale* of each case is different. Sondergard's assertion is both inaccurate and irrelevant.

Contrary to Sondergard's assertion, the courts in *Sandstrom* and *Ratliff* did not ignore the express consent theory. They rejected it. The district court in *Sandstrom* determined that there was no "consensual submission" to

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[3] Waiver of constitutional rights is a question to be decided under federal law. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 630 (1988); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Waiver is a voluntary, knowing, intelligently-made relinquishment of a known right with full knowledge of the consequences. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). There is a strong presumption against waiver of constitutional rights, including due process rights. *Johnson v. U.S. Dep't of Agriculture*, 734 F.2d 774, 784 (11th Cir. 1984); *Monsanto Co. v. Ruckelshaus*, 753 F.2d 649 (8th Cir. 1985).

jurisdiction connected with the appointment of a registered agent, and the First Circuit found this analysis "convincing[]." 904 F.2d at 89 n. 6. In *Ratliff*, the Fourth Circuit did not use the term "express consent," but implicitly rejected that type of standard. The court applied *International Shoe* in rejecting all talismanic or "mechanical" tests for jurisdiction, including "presence" and "mere compliance with procedural requirements of notice." 444 F.2d at 746-47. "Express consent" – or whatever term is used to describe the analysis that deems the appointment of a registered agent to be sufficient without further inquiry – is a mechanical test of the type rejected by *Ratliff* on the strength of *International Shoe*.

Even if the lower courts have employed different rationales in reaching their different conclusions, that is a reason for *granting* certiorari rather than denying it in the present case. Circuit splits are *often*, if not usually, caused by courts applying different standards to identical facts in order to achieve different results. The question here is the constitutional significance of the appointment of a registered agent. The lower courts have reached conflicting results. Should this Court allow the lower courts to apply differing standards to the question of whether fundamental constitutional rights have been waived? Should the Court allow the lower courts to reach different results on identical facts where important constitutional rights are concerned? Should the lower courts decide for themselves whether to ignore or to apply *International Shoe*? The answer to these questions is clearly "no." Resolving these types of conflicts and establishing uniform standards to be applied by the lower courts are among the primary purposes of certiorari jurisdiction. *Braxton v.*

United States, ___ U.S. ___, 111 S.Ct. 1854, 1857 (1991); Supreme Court Rule 10.1(a).

Finally, even if *Ratliff* and *Sandstrom* are somehow ineligible for circuit split consideration because they allegedly did not address "express consent," that still leaves *Siemer* in the fray. Sondergard admits that *Siemer* did address express consent. *Siemer* is indistinguishable factually and its holding is irreconcilable with the Eighth Circuit's. Regardless of how the Court views Sondergard's attempted distinction between express and implied consent, there remains a circuit split to be resolved by the Court.

B. The Eighth Circuit's Decision Conflicts With Decisions Of This Court.

Sondergard argues that the Eighth Circuit's decision was consistent with Supreme Court precedent. He cites mostly pre-*International Shoe* decisions, which Miles has already discussed. *See* Petition For Certiorari at 12-13. And he conspicuously avoids discussing *Shaffer v. Heitner*, 433 U.S. 186 (1977), the most significant post-*International Shoe* case in this context. *See* Petition For Certiorari at 13. However, Sondergard also cites *dicta* from two post-*International Shoe* cases that must be analyzed.

Sondergard selects a sentence from *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444 (1952), suggesting that service of process on a registered agent would be sufficient to confer jurisdiction. The immediately following sentence, not quoted by Sondergard, states: "This has been squarely held to be so in a proceeding in personam against such a corporation, *at least in relation to a cause of*

action arising out of the corporation's activities within the state of the forum." 342 U.S. at 444-45 (emphasis added). The Court in *Perkins* did not purport to address the question raised here: is the appointment of a registered agent alone sufficient in a case that arose in another state? If it had, it surely would have applied *International Shoe*, which it followed in other respects, rather than adopting the mechanical "consent" test employed by the Eighth Circuit. Indeed, the Court in *Perkins* went on to state:

> The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide *a helpful but not a conclusive test.*

342 U.S. at 445 (emphasis added).

Sondergard also cites *dicta* from *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). However, that case involved a statute of limitations question under the Commerce Clause. It also involved a cause of action that arose in the forum state, unlike the present case. The Court did not decide the issues presented here, and did not discuss either "express consent" or the applicability of *International Shoe*.

II. RESPONDENT HAS NOT RECONCILED THE EIGHTH CIRCUIT'S ALTERNATIVE RULING WITH THE DECISIONS OF OTHER CIRCUITS.

Sondergard attempts to reconcile the Eighth Circuit's alternative ruling – that even in the absence of a registered agent, the appearance of Miles' product on store shelves in South Dakota is by itself sufficient to support

jurisdiction – with the decisions of other circuits. However, his argument is based on mischaracterizations of the record.

First, Sondergard flatly states that he did not waive an evidentiary hearing. (Brief In Opposition at 2, n.1.) This is simply untrue, as set forth in the transcript of proceedings reprinted in Appendix B of the Petition For Certiorari at A23. Sondergard did file a motion for reconsideration in an attempt to "un-waive" his right to an evidentiary hearing after he had lost in the district court, but that court did not allow him a second bite of the apple. *See* Appendix C to the Petition For Certiorari at A39.

Second, Sondergard argues that the forum state activities of the defendants in *Ratliff* and *Siemer* were "minimal compared to Miles' presence and sales in South Dakota." (Brief In Opposition at 13.) The record belies this statement. There is no quantification of Miles' activities whatsoever in this record. There is no evidence of any activity of Miles at all in South Dakota, other than that someone sells its products there. *Ratliff* and *Siemer,* and the host of other cases cited in the Petition For Certiorari, stand for the proposition that sales alone, or even combined with other factors that have not been established here, are insufficient to support general jurisdiction.

Third, Sondergard attempts to distinguish *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984), on the ground that "neither the sales representatives nor Eli Lilly directly sold products in the forum state." (Brief In Opposition at 14.) Sondergard implies that Miles *did* sell its products directly to customers in South Dakota. Again,

this implication is unwarranted. Sondergard presented no evidence as to *how* Miles' products reached consumers in South Dakota. There is no evidence of any direct sales by Miles in South Dakota, and thus no basis for distinguishing *Glater.*

Finally, Sondergard attempts to distinguish *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987), in which $250,000,000 of sales of the defendant's products in the forum state of worth were insufficient to support general jurisdiction. Sondergard points out that in *Bearry,* sales by Beech were negotiated and executed outside the forum state, even though the ultimate purchasers lived and used the products in the forum state. (Brief In Opposition at 15.) As far as the record shows, the same may well be true here. There is no evidence to the contrary.

Sondergard does not attempt to support the argument that the Eighth Circuit's alternative holding is consistent with decisions of this Court. He merely quotes the Eighth Circuit's opinion at length. Because Miles has already discussed the conflict between that opinion and the decisions of this Court, no further discussion is necessary.

CONCLUSION

For all of these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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